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November 4, 2014

***Via Federal Express  
Tracking No. 8060 3942 4178***

Graeme S. R. Brown, Esq.  
Massachusetts Bay Transportation Authority  
Legal Department  
Ten Park Plaza, Suite 3910  
Boston, MA 02116

Re: 150-200 Inner Belt Road, Somerville, MA - Drainage

Dear Attorney Brown:

This letter is to follow up on our discussion regarding your questions concerning the drainage system at 150-200 Inner Belt Road, Somerville, Massachusetts ("200").

As we discussed, prior to 1976, 200 and the MBTA's abutting property (the "MBTA Property") were owned by the Boston and Maine Corporation ("B&M") and contained an integrated drainage system which crossed the current property boundary line between 200 and the MBTA Property. Under the pre-existing drainage system, stormwater collected in catch basins drained into a subterranean concrete drain pipe (the "Drain Pipe") that extended from 200 onto the MBTA Property before draining into the Fitchburg Main Drain and eventually outfalling to the Millers River. The utility records attached as Exhibit A show that the Drain Pipe has been in place since at least 1930.

On December 27, 1976, the MBTA purchased the MBTA Property as part of a larger transaction in which it took ownership of a large amount of B&M's railway holdings across multiple counties in Massachusetts pursuant to a deed that was recorded in the Middlesex South Registry of Deeds at Book 13117, Page 113. B&M retained ownership of 200 after the above conveyance and continued to utilize the Drain Pipe and existing drainage system. After a number of intervening conveyances, my client, North River II, LLC ("North River"), now owns 200.



It is clear that B&M retained at least an implied easement at the time of the 1976 conveyance to the MBTA and retained the right to continue to use the drainage system that has been in effect since 1930. An implied easement is created "when land under a single ownership is severed and the easement is reasonably necessary for the enjoyment of one of the parcels." Silverlieb v. Hebshie, 33 Mass.App.Ct. 911, 912 (1992). An implied easement is based on the "presumed intention of the parties, to be gathered from the language of the instruments when read in light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable." Labounty v. Vickers, 352 Mass. 337, 344 (1967), quoting Dale v. Bedal, 305 Mass. 102, 103 (1940). At the time of the 1976 conveyance, the B&M's and the MBTA's, "presumed intention" was clearly that 200 would continue to utilize the Drain Pipe and drainage system as such use was "reasonably necessary for the enjoyment" of 200. Consistent with this use, stormwater has continued to drain through the Drain Pipe onto the MBTA property from the 1976 conveyance to the present.

The only change made to the Drain Pipe occurred in or about 2000, when Cathartes/AEW IBR Somerville, LLC ("Cathartes"), the then owner of 200, commenced sitework in preparation for construction on the property. Cathartes removed a portion of the Drain Pipe on its property and installed a new system which resulted in drainage from 200 being less than pre-existing levels. Stormwater continued to drain through the Drain Pipe out of 200. A copy of the utility Plan showing the above changes is attached hereto as Exhibit B.

Before any of the above changes were made, Cathartes' civil engineer, Vanasse, Hangen Brustlin, Inc., submitted a drainage report to the MBTA for its review and comment. On June 21, 2000 the MBTA responded to the report by letter from Anna M. Barry, Director of Railroad Operations, a copy of which is attached as Exhibit C, stating "the MBTA has reviewed the subject drainage report for 150/200 Innerbelt Road, Somerville. The MBTA concurs the design adequately handles the storm water runoff from the proposed site, based on the data presented in the study." The modified system did not increase or adversely affect the flow of drainage onto the MBTA Property.

In reasonable reliance on the MBTA's approval of the drainage report, Cathartes, spent tens of millions of dollars developing a 190,357 square foot building on 200 in a manner that continues to drain into the Drain Pipe and the same drainage system that has been in use since 1930. It is my firm opinion that the MBTA will be estopped from now objecting to the drainage system years after representing that the system was adequate.



Furthermore, the description of the properties referenced in the above mentioned 1976 transaction were described by reference to the valuation plans mandated by the Interstate Commerce Commission, and recorded therewith in Plan Book 442 of the Middlesex South Registry of Deeds. Accordingly, the MBTA takes title, subject to the matters disclosed by those plans. Commission, and recorded therewith in Plan Book 442 of the Middlesex South Registry of Deeds. Accordingly, the MBTA takes title, subject to the matters disclosed by those plans.

Pursuant to the line of cases beginning with Jackson v. Knott, 418 Mass. 704, 640 N.E.2d 109 (1994), and including but not limited to Lane v. Zoning Board of Appeals of Falmouth, 65 Mass. App.Ct. 434, 841 N.E.2d 260 (2006) and Duddy v. Mankewich 75 Mass.App.Ct 62 (2009), it is clear that the purchaser of real estate is required to examine the record including not merely documents but plans in order to ascertain the possibility of rights of others. As part of the 1976 transaction, the MBTA obtained full access to B&M's records regarding its railway holdings, including its valuation plans. Valuation plans V1/5 and V1/11, attached hereto as Exhibit D, were readily available to the MBTA at the time of the 1976 conveyance and clearly depict the existence of the existing drainage system. Consequently North River has an express right and easement to use the same. Since the "Short Forms Act" (C. 502 Acts 1912 §21) later codified as G.L. c. 183, § 15, easements cannot be eliminated without an express statement in the deed:

In a conveyance of real estate all rights, easements, privileges and appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary shall be stated in the deed, and it shall be unnecessary to enumerate or mention them either generally or specifically.  
G.L. c. 183, § 15.

Therefore, North River received 200 with the benefit of the easement.

Accordingly, North River's position is that it is entitled to utilize the existing drain pipe and continue to drain onto the MBTA's Property under the implied easement that has existed since 1976. Further, the MBTA is estopped from objecting to the current drainage system based on its representations in 2000 upon which the owner of 200 reasonably relied.

Graeme S. R. Brown, Esq.  
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Please feel free to contact me if you would like to further discuss the matter.

Sincerely,

NORTH RIVER II, LLC

By its attorneys,

THE McLAUGHLIN BROTHERS, P.C.

By: \_\_\_\_\_

  
George A. McLaughlin, III

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